Boston College Law Review

Volume 7 | Issue 4 Article 17

7-1-1966

Bankruptcy Act—Strong Arm Clause—Invalidity of Unfiled Federal Tax Lien Against Trustee.—United States v. Speers

Terence M. Troyer

What the court in *Rangen* should have done was to stress the basic anti-trust policies behind the Robinson-Patman Act, ascertain the precise anti-competitive effects of price discrimination and commercial bribery, compare these effects for their similarities and differences, and determine whether the differences, if any, necessitated the conclusion that commercial bribery does not fall within section 2(c).

In price discrimination, one of several competing buyers receives goods at reduced cost so that he may sell at a price below that of his competitors. It should be noted that the unfair advantage over competitors originates in one market and operates in another. In the case of commercial bribery, one seller is able to exclude his competitors from a market by bribing a fiduciary of the buyer to influence his principal to give the seller an exclusive market. The result is the same as in price discrimination—competing sellers are unable to compete effectively. But in commercial bribery, the unfair advantage originates in the same market in which it operates. The question with which the court would then have been faced is whether it is relevant where the unfair advantage originates; and to this question the court could have easily and soundly answered "no," emphasizing that the tendency toward a lessening of competition is the same, regardless of where the unfair advantage originates.

STEVEN D. OSTROWSKY

Bankruptcy Act—Strong Arm Clause—Invalidity of Unfiled Federal Tax Lien Against Trustee.—*United States v. Speers.*[1]—On June 3, 1960, respondent-trustee's bankrupt was assessed for unpaid federal taxes. Demand for payment was made but not met, giving rise to a lien under Section 6321 of the Internal Revenue Code of 1954, but no notice was filed as provided in section 6323. On June 20, the bankrupt filed his voluntary petition in bankruptcy. Respondent contended that the federal tax lien is invalid as to him, since Section 70(c) of the Bankruptcy Act[2]—the so-called Strong Arm Clause—gives him the rights of a judgment creditor and Section 6323 of the Internal Revenue Code invalidates an unfiled lien as against a judgment creditor. He prevailed before the referee, the district court, and on appeal to the Sixth Circuit.[3] Certiorari was granted because of a conflict with decisions in the Second, Third, and Ninth Circuits.[4] HELD: Affirmed.

---

[1] 382 U.S. 266 (1965).

[2] 66 Stat. 430 (1952), 11 U.S.C. § 110(c) (1964).

[3] In re Kurtz Roofing Co., 335 F.2d 311 (6th Cir. 1964).

[4] Simonson v. Granquist, 287 F.2d 489 (9th Cir. 1961), rev'd on other grounds, 369 U.S. 38 (1962); In re Fidelity Tube Corp., 278 F.2d 776 (3d Cir.), cert. denied sub nom. Borough of East Newark v. United States, 364 U.S. 828 (1960); Brust v. Sturr, 237 F.2d 135 (2d Cir. 1956); United States v. England, 226 F.2d 205 (9th Cir. 1955). Accord, In re Estrada's Market, 222 F. Supp. 253 (S.D. Cal. 1963); In re National Insul-Fluf, Inc., Bankr. L. Rep. ¶ 58559 (S.D. Cal. 1956); In re Green, 124 F. Supp. 481 (N.D. Ala. 1954); In re Ann Arbor Brewing Co., 110 F. Supp. 111 (E.D. Mich. 1951); In re Taylorcraft Aviation Corp., 168 F.2d 808 (6th Cir. 1948) (dictum). Contra, In re Sport Coal Co., 125 F. Supp. 517 (S.D.W.Va. 1954), rev'd on other grounds sub nom. United States v. Eiland,

A trustee in bankruptcy has the status of a judgment creditor under section 6323, even though he does not actually claim under a judgment.

The Court, speaking through Mr. Justice Fortas, distinguished *United States v. Gilbert Associates, Inc.*,[5] in which it had said that "Congress used the words 'judgment creditor' [in section 6323] . . . in the usual, conventional sense of a judgment of a court of record."[6] In *Gilbert*, the status of judgment creditor had been accorded by a New Hampshire statute to a receiver in state insolvency proceedings. The Court had refused to recognize that status for the purpose of invalidating a federal tax lien, since to do so would impair the uniformity Congress desired in the collection of taxes because the validity of a lien would depend on the nature and form of rights given in each particular state. The Court in the instant case found this objection inapplicable to federal bankruptcy law, which is uniform throughout the United States.

From legislative history, the Court concluded that Section 70(c) of the Bankruptcy Act was intended to confer on the trustee the status of judgment creditor and that Section 6323 of the Internal Revenue Code recognized that status. Mr. Justice Black dissented, arguing that "judgment creditor" was used in section 6323 in its ordinary sense and does not apply to artificial, statutory "judgment creditors." In his view, section 70(c) was not intended to affect established federal tax lien law but merely to give the trustee control of the bankrupt's property.

The problem in this case is the harmonious construction of two federal statutes. The Bankruptcy Act gives the trustee the "rights, remedies, and powers" of a judgment creditor.[7] The Internal Revenue Code provides that a tax lien is not valid against a judgment creditor unless notice of the lien has been filed in an appropriate office in the place where property subject to the lien is located.[8] Although the obvious construction of these two statutes

---

223 F.2d 118 (4th Cir. 1955); United States v. Sands, 174 F.2d 384 (2d Cir. 1949) (dictum).

[5] 345 U.S. 361 (1953).

[6] Id. at 364.

[7] Section 70(c) reads in pertinent part:

> The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

Even though it is clear that one can be a holder of a lien by legal or equitable proceedings without being a judgment creditor (e.g., an attachment lienor), not even the Government's brief seriously contested the fact that a trustee, as a holder of a lien by legal or equitable proceedings, can invoke the rights of a judgment creditor. Brief for Petitioner, p. 15 n.7a. Section 70(c) formerly conferred that status specifically, Act of June 22, 1938, ch. 575, § 70(c), 52 Stat. 881, and the amendment which substituted the present language was expressly not intended to limit the rights of the trustee. H.R. Rep. No. 1293, 81st Cong., 2d Sess., reported in 2 U.S. Code Cong. & Ad. News 1985, 1989 (1950). See the numerous cases holding the trustee to be a judgment creditor cited by Judge Kalodner in his dissenting opinion to In re Fidelity Tube Corp., supra note 4, at 782-92.

[8] Section 6323 reads in pertinent part:

> Except as otherwise provided in subsections (c) and (d), the lien imposed

would leave unfiled liens invalid against the trustee, the judicial history of federal tax liens casts some doubt on this construction.[9] The Court's resolution of that doubt on the basis of the legislative history of each of the statutes is not altogether satisfying.

It is arguable that Congress intended by section 70(c) no more than to make available to creditors in bankruptcy all the assets they could have reached absent bankruptcy. The status of lien creditor was first conferred on the trustee by amendment to the Bankruptcy Act in 1910[10] to avoid the result of a case[11] which Congress interpreted as

> holding that the trustee stood precisely in the bankrupt's shoes. . . . Thus the evil of secret liens has continued. It is this evil and the injustice worked upon creditors who rely upon the debtor's apparent ownership against which the bankruptcy law has set its face.
>
> The proposed amendment, while correcting the defect named, at the same time carefully guards the rights of all parties. . . . In this way, in effect, proceedings in bankruptcy will give to creditors the same rights that creditors under the state law would have had had there been no bankruptcy, and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted the trustee.[12]

Committee reports make clear that the amendments in 1938[13] and 1950[14] to what is now section 70(c) were not intended to change that section materially. Thus it appears that, although section 70(c) was intended to combat

---

by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under State or Territorial laws.

In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With clerk of district court.

In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice . . . .

[9] For cases which hold such liens valid, see note 4 supra. The treatment which has recently been given federal tax liens suggests a tendency to enforce them wherever possible, even if the result is a strained construction. See, e.g., United States v. White Bear Brewing Co., 350 U.S. 1010 (1956), reversing per curiam 227 F.2d 359 (7th Cir. 1955). See generally Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L.J. 905 (1954).

[10] Act of June 25, 1910, ch. 412, § 8, 36 Stat. 840.

[11] York Mfg. Co. v. Cassell, 201 U.S. 344 (1906).

[12] 45 Cong. Rec. 2277 (1910).

[13] H.R. Rep. No. 1409, 75th Cong., 1st Sess. 34 (1937) ("There is no change in substance . . . .").

[14] H.R. Rep. No. 1293, 81st Cong., 2d Sess. (1949), reported in 2 U.S. Code & Ad. News 1985, 1989 (1950) (". . . to simplify, and to some extent expand, the general expression of the rights of trustees in bankruptcy.").

secret liens, it was not intended to defeat a federal tax lien, which is valid against all the taxpayer's creditors.[15] So Mr. Justice Black concluded.[16]

The general rule is that federal bankruptcy law establishes the trustee's status, but that the rights of one with that status are determined by applicable non-bankruptcy law.[17] Thus state law generally determines the trustee's rights as a judgment creditor, but it cannot discriminate between the trustee and judgment creditors in general, since matters of status are preempted by federal law.[18] It is possible, however, that the status given by the Bankruptcy Act has been amended by implication in the Internal Revenue Code (which was enacted in 1954, two years after the last amendment to section 70(c)). Therefore, it is necessary to examine the legislative intent behind section 6323. It is not clear that that section was intended to protect artificial, statutory judgment creditors.

The House version of section 6323 included a subsection (c) which specifically excluded a "judgment creditor" who does not have a valid judgment obtained in a court of record and of competent jurisdiction because

> this subsection is not designed to extend the protection of subsection (a) of this section to categories of persons now denied protection by existing court decisions (under section 3672(a) of the 1939 code) which determines who is a mortgagee, pledgee, purchaser, or judgment creditor by reference to the realities and facts in a given case rather than to the technical form or terminology used to designate such person.[19]

The Senate version deleted that subsection:

> The applicable rules have been developed under existing law by judicial construction, and your committee deems it advisable to continue to rely upon judicial interpretation of existing law instead of attempting to prescribe specific statutory rules. The deletion of subsection (c) will continue in effect the existing law.[20]

The House receded for the reasons given in the Senate report.[21]

The majority in *Speers* felt that the "existing law" to which the Senate referred was expressed not in *Gilbert* but in *United States v. Sands*,[22] which contained a dictum to the effect that the trustee's judgment creditor status

---

[15] If the lien is invalid against any creditor having a claim provable against the estate, the trustee may avoid the lien without the aid of § 70(c). Bankruptcy Act § 70(e), 52 Stat. 882 (1938), as amended, 11 U.S.C. § 110(e) (1964).

[16] Cf. Pacific Fin. Corp. v. Edwards, 304 F.2d 224 (9th Cir. 1962).

[17] 4 Collier, Bankruptcy ¶ 70.49, at 1415-17 (14th ed. 1959).

[18] U.S. Const. art. VI; Commercial Credit Co. v. Davidson, 112 F.2d 54, 55 (5th Cir. 1940).

[19] H.R. Rep. No. 1337, 83d Cong., 2d Sess., reported in 3 U.S. Code Cong. & Ad. News 4025, 4554 (1954). Essentially this language has been adopted by the Treasury Department. Treas. Reg. § 301.6323-1(a)(2)(b)(ii) (1954).

[20] S. Rep. No. 1622, 83d Cong., 2d Sess., reported in 3 U.S. Code Cong. & Ad. News 4621, 5224 (1954).

[21] H.R. Rep. No. 2543, 83d Cong., 2d Sess., reported in 3 U.S. Code Cong. & Ad. News 5280, 5340 (conference report).

[22] 174 F.2d 384 (2d Cir. 1949).

was sufficient to defeat a federal tax lien.[23] It seems that the majority's position is weak for three reasons. First, the House report considered existing law to deny the trustee status sufficient to defeat the lien, seeming to approve of *Gilbert*. The Senate did not reject this interpretation, but merely refused to codify it. Secondly, the statement in *Sands* was clearly dictum and of little more persuasiveness than the contrary dictum of *In re Taylorcraft Aviation Corp.*[24] Thirdly, all appellate courts which considered the problem after *Gilbert* was handed down (except, of course, the principal case) felt obliged by that decision to rule against the trustee.[25] Since none of these decisions preceded the Senate report, they cannot be part of the "existing law" to which the Senate referred, but they are of value as contemporary interpretations of "existing law."[26] The majority's conclusion is not required by their determination that a later Congress regarded these holdings as "an erroneous gloss placed upon [section 6323] . . . by the courts."[27]

Since the legislative history of neither section 70(c) nor section 6323 is conclusive as to the rights of the trustee vis-à-vis a federal tax lien, it seems proper to determine whether the effects of the construction given them in the principal case will be beneficial. What the principal effect of the decision will be is obvious—wherever reasonably convenient, the United States will file notice of its lien. This, in turn, will promote the legislative purpose behind section 6323, which is to protect those who subsequently deal with the delinquent taxpayer.[28] So far as this notice comes to their attention, either directly or through its effect on the taxpayer's credit rating, potential creditors will be less willing to finance the taxpayer without adequate security. Indeed, it is this point which has furnished the only real controversy as to the wisdom of granting judgment creditor status to the trustee. As the Treasury Department sees it:

> The filing of this notice may have the effect of curtailing the credit

---

[23] Id. at 385:

> While we agree with the contention of the Government, we put to one side as only confusing and misleading a suggestion accepted below and partially urged here, in reliance upon a dictum of In re Taylorcraft Aviation Corp., 6 Cir., 168 F.2d 808, 810, that "an unrecorded tax lien of the collector was good against a trustee because a trustee was not a judgment creditor." We do not see how this dictum can be followed in view of the express provision to the contrary in Bankruptcy Act, § 70, sub. c . . . .

It is difficult to see how Mr. Justice Fortas can regard this statement as squarely passing on the issue.

[24] 168 F.2d 808 (6th Cir. 1948).

[25] Simonson v. Granquist, supra note 4; In re Fidelity Tube Corp., supra note 4; Brust v. Sturr, supra note 4; United States v. England, supra note 4.

[26] If indeed the Court has misinterpreted the intent of Congress, it is no answer to say that Congress can change the law. Amendment of a statute requires the agreement of Senate, House, and President. If the Court has misinterpreted the statute, it has shifted the burden of obtaining this agreement from the group favoring invalidation of the federal lien—which was unable to carry it in 1960 when President Eisenhower vetoed such an amendment, 106 Cong. Rec. 19168 (1960)—to the group opposed.

[27] 382 U.S. at 275.

[28] See S. Rep. No. 1315, 62d Cong., 3d Sess. (1913); H.R. Rep. No. 1018, 62d Cong., 2d Sess. (1912); 49 Cong. Rec. 1802 (1913).

> and limiting the future financing of a business and may well force into bankruptcy many businesses which are only in temporary financial difficulty and which might otherwise have been able to be rehabilitated. In such cases, the loss to the taxpayers who own the businesses in question, their employees, and their creditors is obvious. The Service has, as a matter of administrative practice, exercised forbearance as a creditor in cases where there exists a reasonable possibility that the business can regain financial stability.[29]

But the National Bankruptcy Conference feels:

> General creditors who can never receive dividends until tax claimants of all kinds are paid in full under section 64 are benefited by a rule which furnishes the Federal Government as well as other varieties of secured creditors an effective incentive to disclose their liens. They are benefited because they can then act in the light of relevant information about the financial condition of their debtor which they are entitled to have. . . .
>
> It is suggested that [granting the trustee the status of judgment creditor] . . . will interfere with the Internal Revenue Service's exercise of forbearance in cases where there is a reasonable possibility that the business can regain financial stability. If such a justification for withholding liens from the record and other significant information from creditors has any validity, then the notice filing legislation of Congress and the States is indeed ill conceived. What is needed is not sanctions forcing out information about a debtor's true financial condition, but a paternalistic administrative agency gaging [*sic*] how much it is proper to feed out from time to time.[30]

As the author of the above memorandum pointed out, general creditors will obtain no *direct* benefit from the invalidation of the federal tax lien. Tax debts remain a fourth priority claim, which will be fully paid before any payment to general creditors.[31] Furthermore, one factor detracts somewhat from even the indirect protection afforded by the rule given in the principal case. It is possible that filing of notice after bankruptcy will be held to validate the lien. An argument to this effect was offered below in the court of appeals, but that court refused to hear it since it had not been raised in the district court and the record did not contain evidence of such subsequent filing[32] (although it had occurred). Although the status of statutory liens would seem to be fixed at the moment of bankruptcy, Section 67(b) of the Bankruptcy Act provides that, if "not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by, and in

[29] S. Rep. No. 1133, 88th Cong., 2d Sess. 18 (1964) (letter from Stanley S. Surrey, Ass't Secretary of the Treasury).

[30] Id. at 25 (memorandum by Frank R. Kennedy, Chairman, Drafting Comm., National Bankruptcy Conference).

[31] Bankruptcy Act § 64, 52 Stat. 874 (1938), as amended, 11 U.S.C. § 104 (1964).

[32] In re Kurtz Roofing Co., supra note 3, at 314.

accordance with the requirements of [the statute establishing the lien] . . . ."[33] This provision probably will not save a federal tax lien, however, since the requirements of section 6323 include filing before a judgment creditor secures his lien.

Not even the celebrated zeal of the Internal Revenue Service will enable them to ferret out all property every delinquent taxpayer owns throughout the United States so as to be able to file notice covering it. It is when notice has for any reason not been filed and the taxpayer has been adjudicated a bankrupt that the secondary effects of the decision in the principal case are felt.[34] When a bankruptcy trustee invalidates a lien under section 70(c), the lien is totally destroyed and of no effect, even against third parties, and property formerly subject to the lien is then handled in the same way as any other of the bankrupt's property.[35] First entitled to the proceeds are creditors with a security interest junior to the invalidated lien.[36] It is true that the trustee may be permitted by the court to subrogate himself to the invalidated lien in certain circumstances and precede such creditors,[37] but this power will rarely be of any consequence when a federal tax lien is involved.[38]

Once secured creditors have been satisfied (or immediately if the trustee is permitted to subrogate to the federal lien), the trustee distributes the proceeds according to the scheme of priorities in Section 64 of the Bankruptcy Act.[39] Under that scheme, the only class of creditors which will normally

---

[33] 66 Stat. 427 (1952), 11 U.S.C. § 107(b) (1964).

[34] Most obvious is the fact that the United States will not receive so large a share of the average bankrupt's estate as it has formerly. Between 1953 and 1962 secured creditors realized an average of 65.1% on their debts, while priority creditors averaged only 33.3%. Countryman, Cases on Debtor and Creditor 330 (1964).

[35] 4 Collier, op. cit. supra note 17, ¶ 70.54, at 1446-47. Cf. Moore v. Bay, 284 U.S. 4 (1931) (opinion by Holmes, J.).

[36] City of Richmond v. Bird, 249 U.S. 174 (1919); 3 Collier, op. cit. supra note 17, ¶ 64.02, at 2060.

[37] Bankruptcy Act § 70(e)(2), 66 Stat. 430 (1952), 11 U.S.C. § 110(e)(2) (1964). This provision may be invoked only if there is a creditor with a claim provable against the estate who may avoid the lien. See 4 Collier, op. cit. supra note 17, ¶ 70.90, at 1729. In addition, the court may exercise some discretion in permitting the trustee to subrogate, id., ¶ 67.16, at 157, and may refuse to do so merely to defeat a junior lien, In re Arrington Lumber, Inc., 180 F. Supp. 543 (E.D. Va. 1960).

[38] Federal tax liens are valid against all but those secured creditors who are specifically exempted by § 6323. Since such a creditor's security is senior to the federal lien in any event, it is pointless for the trustee to subrogate, unless the value of property is more than sufficient to cover the senior lien and there is a third lien which is junior to the federal lien. In such a situation, it appears unlikely that a court would find it equitable to permit the subrogation, although technically the trustee does have standing to ask it to do so. 4 Collier, op. cit. supra note 17, ¶ 70.90, at 1729-30.

[39] 52 Stat. 874 (1938), as amended, 11 U.S.C. § 104 (1964). This section creates five priorities, each of which must be paid in full before any payment to the next lower priority, and all of which must be paid in full before any payment to general creditors. The priorities are: (1) Administrative expenses and fees of the bankruptcy proceedings; (2) wage claims; (3) creditors' expenses in successfully opposing an arrangement, a wage-earner plan, or a discharge, or in adducing evidence leading to the bankrupt's conviction of certain criminal offenses; (4) unsecured tax debts; and (5) debts given priority by other state and federal laws.

benefit from the invalidation of a federal lien will be state and local taxing authorities. Since it may be assumed that the average bankrupt will have his real property mortgaged to the hilt, invalidation of the federal lien will usually have no effect on the disposition of real property, as the mortgagee would prevail over the United States in any event,[40] and there would usually be little or no equity of redemption to be transferred from the United States to the trustee. As to personal property, it is unlikely that the United States will be in possession of any belonging to the taxpayer which is located in an area in which no notice has been filed.[41] Even if valid, a tax lien on such property is postponed until payment of first and second priority claims.[42] Since the third priority is little used,[43] normally the only beneficiaries of invalidation will be fourth priority claimants—unsecured federal, state, and local tax claims. These, and the formerly secured federal claim, will all share pro rata in the taxpayer's assets.[44] Thus state and local claims receive a double windfall at the moment of bankruptcy: junior state tax liens become senior, and unsecured claims share with the formerly secured federal claim. However, the mere mention of windfall should not preclude the invalidation of the federal lien. It is inherent in bankruptcy that certain creditors, notably those entitled to a priority under section 64, receive windfalls.[45] Congress has decreed what it feels is a fair method of distribution of the bankrupt's assets. To facilitate that distribution, any slight irregularity in dealing with the bankrupt is seized upon, the transaction invalidated, and the proceeds realized from the bankrupt are placed in the general fund.[46] The only question is whether federal tax liens should be exempt from that process. It is this question that the Court has answered in the negative.

One possibly pernicious effect of the decision in the instant case ought to be noted. Since the validity of liens against the trustee is determined primarily by state law once the status of the trustee has been established

---

[40] Internal Revenue Code of 1954, § 6323.

[41] United States v. Sands, supra note 4, holds that a federal lien is perfected by taking possession of the property and that it is therefore unnecessary to file notice as provided in § 6323. This question has not been squarely faced since *Sands*, although some courts have arrived at the same conclusion and then found it unnecessary to consider whether an unfiled federal tax lien is valid against the trustee in general. E.g., Henkin v. United States, 229 F.2d 895 (2d Cir. 1956).

[42] Bankruptcy Act § 67(c), 66 Stat. 427 (1952), 11 U.S.C. § 107(c) (1964). It is interesting to note that the Internal Revenue Service has attempted, without success, to evade this provision by an argument analogous to the one used in the principal case—namely, that Internal Revenue Code of 1954 § 6321 is the governing law and makes no mention of postponement. In re American Health Studios, 178 F. Supp. 553, 560 (S.D. Tex. 1959).

[43] Between 1954 and 1960, only 2.1% of the assets distributed in bankruptcy were paid to third and fifth priority claimants combined. Countryman, op. cit. supra note 34, at 718.

[44] Subject to the limitation that claims for property taxes cannot exceed the value of the property against which they are assessed. Bankruptcy Act § 64(a)(4), 52 Stat. 874 (1938), 11 U.S.C. § 104(a)(4) (1964).

[45] See 4 Collier, op. cit. supra note 17, ¶ 70.54, at 1446-47.

[46] King, Pacific Finance Corporation v. Edwards: Another Misreading of Section 70c of the Bankruptcy Act, 63 Colum. L. Rev. 232, 235-36 (1963).

by the provisions of the Bankruptcy Act,[47] states can, and do, defeat the claim of the trustee so as to benefit favored creditors.[48] This means that in the bankruptcy situation state law will essentially determine the validity, or at least the value, of an unfiled federal tax lien—a result very much at odds with the result outside of bankruptcy.[49] To make federal tax claims subject to state law seems to injure the principle of uniformity the Court laid down in *Gilbert* and apparently desires to preserve.

Gilbert has been widely cited as authority for the proposition that Congress used the words "mortgagee, pledgee, purchaser, or judgment creditor" in section 6323 in the "usual, conventional sense."[50] It now appears that this statement has been substantially disavowed. If so, *quaere:* What effect will this disavowal have on the precedential value of decisions citing *Gilbert?* So long as the principle of uniformity is preserved, will courts be freer to consider general policy in determining priorities against the federal tax lien? The only such policies the Court suggests are the policy against secret liens and the policy in favor of protecting state and local tax-gathering against federal encroachment. This seems to extend the erosive pattern which has since 1805 characterized judicial treatment of statutes granting priority to debts due the United States.[51] If such erosion is truly desirable, it ought not to depend on the fortuitous[52] intervention of bankruptcy. If not, bankruptcy ought not to produce undeserved windfalls for state and local taxing authorities.

TERENCE M. TROYER

Contracts—Health and Dance Services—Rescission for Customer's Disability.—***Acosta v. Cole.***[1]—Plaintiff contracted with a local Arthur Murray Dance Studio in Louisiana for 1205 hours of lessons for the prepaid sum of $11,000. Plaintiff then became physically unable to use all of the lessons and sued to recover the unearned portion of the consideration. The lower court held that a "no-refund" clause in the contract precluded recovery. The Louisiana Court of Appeal, reversing,[2] HELD: A party to a prepaid contract

[47] 4 Collier, op. cit. supra note 17, ¶ 70.70, at 1520.

[48] S. Rep. No. 1133, 88th Cong., 2d Sess. 2 (1964). For an example of this process, see U.C.C. § 2-702. California, Illinois, Maine, New Mexico, and New York have omitted the words "or lien creditor" to avoid the result of In re Kravitz, 278 F.2d 820 (3d Cir. 1960). Willier & Hart, Uniform Commercial Code Reporter-Digest 1-171 (1965).

[49] See United States v. White Bear Brewing Co., supra note 9; United States v. Acri, 348 U.S. 211, 213 (1955).

[50] E.g., Hoare v. United States, 294 F.2d 823, 825 (9th Cir. 1961) (mortgagee).

[51] See Comment, 7 B.C. Ind. & Com. L. Rev. 366, 367-69 (1966). See generally Kennedy, supra note 9.

[52] Over 98% of bankruptcies are initiated by voluntary petitions. Countryman, Bankruptcy Boom, 77 Harv. L. Rev. 1452, 1453 (1964).

[1] 178 So. 2d 456 (La. App. 1965).

[2] The lower court had awarded plaintiff the sum of $98.08 but had rejected plaintiff's other demands. The court of appeal did not actually reverse the lower court but amended the decision allowing plaintiff to recover the unearned portion of the contract price.